For Immediate Release
Date: August 28, 2018

Judge Kavanaugh Criticized Or Stated His Intention To Overturn Multiple Supreme Court Precedents. In Many Key Cases, Judge Kavanaugh Would Undermine Justice Kennedy's Legacy.

Roe v. Wade (1973)

In *Roe v. Wade*, the Supreme Court held 7-2 that the right to privacy under the 14th Amendment extends to a woman's decision to have an abortion. Justice Rehnquist dissented in the case.

Judge Kavanaugh praised Justice Rehnquist as his "first judicial hero" and touted his dissent in *Roe*. Judge Kavanaugh specifically pointed to the portion of the dissent in which Rehnquist argued that unenumerated rights had to be founded in the nation's history and traditions and that a right to abortion did not meet that test. According to Drexel Law Professor David S. Cohen, "while he doesn't come out and say 'the dissent is right,' it is pretty clear he agrees with Rehnquist."

Judge Brett Kavanaugh: "A few months after he joined the Court in 1972, Justice Rehnquist faced an oral argument about the constitutionality of a state law prohibiting abortion in the case of *Roe vs. Wade*. Rehnquist, along with Justice Byron White, ultimately dissented from the Court's seven-two holding recognizing a constitutional right to abortion. Rehnquist's dissenting opinion did not suggest that the Constitution protected no rights other than those enumerated in the text of the Bill of Rights. But he stated that under the Court's precedents, any such unenumerated right had to be rooted in the traditions and conscience of our people. Given the prevalence of abortion regulations both historically and at the time, Rehnquist said he could not reach such a conclusion about abortion. He explained that a law prohibiting an abortion, even where the mother's life was in jeopardy, would violate the Constitution, but otherwise he stated

the states had the power to legislate with regard to this matter. In later cases, Rehnquist reiterated his view that unenumerated rights could be recognized by the courts only if the asserted right was rooted in the nation's history and tradition." [Remarks at AEI, 9/18/17]

Planned Parenthood v. Casey (1992)

Justice Kennedy, along with Justice O'Connor, wrote the plurality opinion in *Planned Parenthood v. Casey*, reaffirming *Roe v. Wade*'s core holding that the Constitution protects a woman's right to make fundamental decisions about her own health care, including whether to have an abortion.

Judge Kavanaugh praised Justice Scalia as a "role model" and a "judicial hero." In a speech memorializing the late Justice, Judge Kavanaugh touted Scalia's dissent in *Casey*, saying "courts have no legitimate role, Justice Scalia would say, in creating new rights not spelled out in the Constitution," In that dissent, Justice Scalia contended that the court had no right to regulate abortion and that "The permissibility of abortion, and the limitations upon it, are to be resolved like most important questions in our democracy: by citizens trying to persuade one another and then voting."

[See the quote below, also mentioning *Obergefell v. Hodges,* for full quotation]

Obergefell v. Hodges (2015)

Justice Kennedy wrote the majority opinion holding that the Constitution guarantees same-sex couples the right to marry. Kennedy held that the Due Process Clause's protections of individuals' fundamental liberties encompasses the right to marry—which extends equally to same-sex and opposite-sex couples. He also held that denying same-sex couples access to the right to marry violates the 14th Amendment by denying them equal protection under the law. Justice Kennedy concluded by speaking directly to the same-sex couples who sought legal recognition of their union: "They ask for equal dignity in the eyes of the law. The Constitution grants them that right."

In a speech memorializing the late Justice Scalia, Judge Kavanaugh praised Scalia as a "role model" and a "judicial hero" and touted Scalia's dissent in *Obergefell*, saying, "for Justice Scalia, it was not the court's job to improve on or update the Constitution to create new rights."

Judge Brett Kavanaugh: "In short, Justice Scalia was a fierce guarantor of individual rights articulated in the Constitution and he was not afraid, never afraid, to use his judicial role to upend even seemingly settled practices that infringed on those rights. No deference there. But on the flipside courts have no legitimate role, Justice Scalia would say, in creating new rights not spelled out in the Constitution. On those issues, he believed in complete deference to the political branches and the states, deference not for the sake of deference but deference because the Constitution gave the court no legitimate

role in the case. Think about his dissents in *Casey* on abortion, in *Obergefell* on same sex marriage, his opinions on the constitutionality of the death penalty in response to the abolitionist positions articulated by some of his fellow justices over the years. For Justice Scalia, it was not the court's job to improve on or update the Constitution to create new rights. That is the job of the people through the amendment process or the legislatures to the extent permissible. So courts should defer to those bodies, he said, and defer completely. Put simply, he was deferential when the Constitution and statutes called for deference. He was not deferential when they did not." [Remarks to GMU Law School, 6/2/16]

United States v. Nixon (1974)

In *United States v. Nixon*, the Supreme Court issued a unanimous decision ordering President Nixon to deliver tapes and other subpoenaed materials to a District Court. Justice Rehnquist had recused himself as he had previously served in the Nixon administration.

In 1999 comments, Kavanaugh suggested that he may believe that *US v. Nixon* should be overruled, saying "maybe *Nixon* was wrongly decided" and that "the president is the chief law enforcement officer. That is one of the bedrock principles that has gotten lost since *Nixon*."

Brett Kavanaugh: "Should *United States v. Nixon* be overruled on the ground that the case was nonjusticiable intrabranch dispute? Maybe so." [Wash. Law. 34 (1999), Lawyers' Roundtable: Attorney-Client Privilege; p. 191]

Brett Kavanaugh: "But maybe *Nixon* was wrongly decided — heresy though it is to say so. *Nixon* took away the power of the president to control information in the executive branch by holding that the courts had power and jurisdiction to order the president to disclose information in response to a subpoena sought by a subordinate executive branch official. That was a huge step with implications to this day that most people do not appreciate sufficiently...Maybe the tension of the time led to an erroneous decision." [AP Quoting January-February Issue of Washington Lawyer, 7/22/18]

Brett Kavanaugh:
LACOVARA: Do you accept the proposition that the attorney general, or the independent counsel, is the country's chief law enforcement officer?
KAVANAUGH: I do not. **The president is the chief law enforcement officer. That is one of the bedrock principles that has gotten lost since *Nixon.* The power of the president in these situations has diminished dramatically.** [Wash. Law. 34 (1999), Lawyers' Roundtable: Attorney-Client Privilege; p. 191]

Morrison v. Olson (1988)

In *Morrison v. Olson*, the Supreme Court held 8-1 that the Independent Counsel Act was constitutional. Under the law, a panel of judges could appoint outside lawyers to investigate executive-branch officials. The law was allowed to expire in 1999 among concerns from Democrats and Republicans.

Justice Scalia dissented on the basis of separation of powers, stating that "without a secure structure of separated powers, our Bill of Rights would be worthless." Notably, Justice Kagan praised the dissent, calling it "one of the greatest dissents ever written and every year it gets better."

Judge Kavanaugh directly stated that he thinks this precedent should be overturned, saying "I would put the final nail in."

Judge Brett Kavanaugh:
GIGOT: Can you think of a case that deserves to be overturned?
KAVANAUGH: Yes.
GIGOT: Would you volunteer one?
KAVANAUGH: No.
GIGOT: Pending confirmation hearings. Yes sir, right here.
AUDIENCE MEMBER: Thank you very much.
KAVANAUGH: Actually, I'm going to say one. *Morrison v. Olson*.
GIGOT: They said that's the independent counsel statute case.
KAVANAUGH: It's been effectively overruled but I would put the final nail in. [Remarks at AEI, 3/31/16]

Clinton v. Jones (1997)

In *Clinton v. Jones*, the Supreme Court ruled unanimously that a sitting president is not immune from civil litigation.

Judge Kavanaugh said "I am not sure whether or not *Clinton v. Jones* is right as a constitutional matter."

Judge Brett Kavanaugh: "I saw the difficulty of the job of president. I have often said that, much as we revere and respect the presidency in this country, we vastly underestimate its demands. I think Walter Dellinger is here, and I am not sure whether or not *Clinton v. Jones* is right as a constitutional matter, but I do know and especially appreciate now that the arguments Walter made about the burdens of the presidency are right-on as a descriptive matter." [Remarks to Inn of Court, 5/17/10; p. 639-644]

Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc. (1984)

In *Chevron v. NRDC*, the Supreme Court unanimously held that the EPA had reasonably determined the meaning of a phrase without specific intention, "stationary source," in the

Clean Air Act. Under the standard of "*Chevron* deference," the courts should defer to an agency's interpretation of the law as long as the agency is not unreasonable.

In an address to Notre Dame, Kavanaugh suggested that under his reading, "Courts would no longer defer to agency interpretations of statutes. This would help keep agencies within statutory bounds and help prevent a runaway executive branch that exploits ambiguities in governing statutes to pursue its broad policy aims." Senator Rounds told the Washington Post that Kavanaugh said to him that he has "reservations about the *Chevron* decision."

Judge Brett Kavanaugh: "*Chevron* tells us that we must defer to an agency's reasonable interpretation of a statute if the statute is ambiguous. To begin with, the *Chevron* doctrine encourages agency aggressiveness on a large scale. Under the guise of ambiguity, agencies can stretch the meaning of statutes enacted by Congress to accommodate their preferred policy outcomes. I saw this firsthand when I worked in the White House, and I see it now from the other side as a judge. But think about what this means in real cases in courts. Say you have a really important agency rule that is being challenged before a three judge panel. The question is whether the agency rule is authorized under the implementing statute. One judge says that the statute is clear and the agency loses. Two other judges say that the statute is ambiguous, so they defer to the agency even though they may agree with the first judge on what is the best reading of the statute. The result is that the agency wins, even though none of the three judges thought that the agency had the better reading of the statute." … "For *Chevron*, courts would simply determine the best reading of the statute. Courts would no longer defer to agency interpretations of statutes. This would help keep agencies within statutory bounds and help prevent a runaway executive branch that exploits ambiguities in governing statutes to pursue its broad policy aims, even in situations where Congress has not enacted legislation embodying those policies." [Notre Dame Law Review Keynote Address, 7/17]

Washington Post: "In multiple meetings, Kavanaugh has discussed his skepticism of the *Chevron* deference, a doctrine stemming from a 1984 Supreme Court ruling that calls on the judiciary to largely defer to federal agencies and their interpretations. "The way he put it was, 'Yes, he does have reservations about the *Chevron* decision,"' Sen. Mike Rounds (R-S.D.) said." [Washington Post, 8/2/18]

Hamdi v. Rumsfeld (2004)

In *Hamdi v. Rumsfeld*, a plurality held that an American citizen accused of fighting against the government in Afghanistan, Yaser Hamdi, could be held as an enemy combatant under law.

Justice Scalia dissented, arguing, "where the Government accuses a citizen of waging war against it, our constitutional tradition has been to prosecute him in federal court for treason or some other crime." He accused the Court of proceeding "to meet the current emergency in a manner the Constitution does not envision." Kavanaugh agreed, stating

that "I believe that Justice Scalia's dissent in *Hamdi v. Rumsfeld* will someday be the law of the land."

Judge Brett Kavanaugh: "Second, I believe that Justice Scalia's dissent in *Hamdi v. Rumsfeld* will someday be the law of the land. In that case, recall that Court held that even absent a formal suspension of the writ of habeas corpus by Congress, American citizens could be detained in military detention as enemy combatants for the duration of hostilities, which could mean a life sentence."… "For *Hamdi* to be overruled, of course it will have to be considered not just wrong but a case with serious practical consequences. I believe that a future court will find that condition met. The concept of lifelong term or even lifetime military detention of US citizens without a criminal trial or formal suspension of the writ is shocking to many Americans, and something that I believe future generations will deem inconsistent with our Constitutional values. In short, I predict that Justice Scalia's dissent in *Hamdi v. Rumsfeld* will someday be the law of the land." [Remarks at George Mason University, 6/2/16]

Decker v. Northwest Environmental (2013)/Auer v. Robbins (1997)

In *Decker v. Northwest Environmental*, Justice Kennedy wrote a majority (7-1) opinion that deferred to the EPA's reasonable interpretation of its own regulation under their interpretation of "*Auer* deference."

Justice Scalia dissented, stating that the principle of "*Auer* deference" "contravenes one of the great rules of separation of powers: He who writes a law must not adjudge its violation." Judge Kavanaugh stated that he believes that Scalia's view – that *Auer* deference "will someday be overruled and that Justice Scalia's dissent in *Decker* will be the law of the land."

Judge Brett Kavanaugh: "Third, I believe that Justice Scalia's dissent in *Decker v. Northwest Environmental* will one day be the law of the land. In that case, Justice Scalia eviscerated the concept of *Auer* deference, otherwise known as Seminole Rock deference."… "On the law, Justice Scalia explained that *Auer* is one big unexplained, unjustified ipse dixit. And there can be no doubt, he pointed out, that it had its huge practical consequences for individual liberty when the law writer is also the law interpreter. In short, I predict that *Auer* will someday be overruled, and that Justice Scalia's dissent in *Decker* will be the law of the land." [Remarks at George Mason University, 6/2/16]

###